No. 4055

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GARCIA & MAGGINI CO. (a corporation), *Plaintiff in Error,* vs. WASHINGTON DEHYDRATED FOOD CO. (a corporation), *Defendant in Error.*	

BRIEF FOR PLAINTIFF IN ERROR.

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This is an appeal of Garcia & Maggini Co. from the judgment of the Southern Division of the United States District Court for the Northern District of California, Second Division, in favor of defendant in error and against plaintiff in error.

Statement of the Cases.

The parties to this action entered into a contract in writing on or about the 13th day of June, 1919, in the City and County of San Francisco, State of California, wherein the defendant in error hereinafter called the plaintiff, agreed to sell, and the

plaintiff in error, hereinafter called the defendant, agreed to purchase sixty thousand (60,000) pounds Choice Evaporated Apples at eighteen and one-half (18½¢) cents per pound, f. o. b. Pacific Coast rail shipping point. Payment was to be made against draft, with documents attached, in New York, Chicago or San Francisco Exchange, or equivalent. The contract further provided that the plaintiff was privileged to substitute grades, providing the plaintiff "cannot fill order with grade ordered at Extra Choice 19¢, Fancy 19¾¢".

The plaintiff alleged that on or about January 17, 1920, it advised the defendant that it was ready to deliver said evaporated apples in accordance with the terms of said contract and demanded that defendant forthwith furnish shipping instructions, but that the defendant failed and refused to furnish said or any shipping instructions and on or about January 23, 1920, notified plaintiff that it would not perform the terms of the contract. Plaintiff further alleged that defendant at all times mentioned failed and refused to perform the terms and conditions of said contract on its part to be kept and performed; that on or about February 13, 1920, plaintiff notified defendant that it would sell said evaporated apples and would hold the defendant for any loss suffered thereby; that plaintiff "within a reasonable time, after the aforesaid notice, sold said evaporated apples for the sum of $7050.00"; that it further paid for storage and insurance on said evaporated apples the sum of $426.44.

In its second cause of action the plaintiff, after setting forth the execution of said contract, and the terms and conditions thereof as set forth in the first count, alleged that on or about the 17th day of January, 1920, it advised the defendant that it was ready to deliver said evaporated apples and demanded shipping instructions thereon; that said defendant failed and refused to furnish it with any shipping instructions and on or about January 23, 1920, notified said plaintiff that it, the said defendant would not perform the terms of the said contract. The second count further alleges that

> "the value of the aforesaid quantity and quality of evaporated apples to plaintiff at Wenatchee in the State of Washington on or about January 17, 1920, was the sum of $2400.00".

The defendant denied that plaintiff on or about June 13, 1919, entered into a contract in writing wherein and whereby it agreed to buy from plaintiff 60,000 pounds or any other quantity of Extra Choice Evaporated Apples at an agreed price or for any other sum, except as set forth in the certain written contract, a copy of which was attached to the answer of defendant; denied that in accordance with the contract set forth and alleged by plaintiff, or in accordance with the contract attached to the answer of defendant the plaintiff was ready, willing or able on or about January 17, 1920, or at any other time, to deliver to said defendant the evaporated apples contracted for, and further denied upon information and belief that the plaintiff within a reasonable

time after the 13th day of February, 1920, sold said evaporated apples for the sum of seven thousand and fifty ($7050.00) dollars;

Defendant answering the second count set forth in the complaint of plaintiff denied that it contracted in writing to purchase from plaintiff 60,000 or any other number of pounds of extra choice evaporated apples at an agreed price, save and except as set forth in the written contract, a copy of which was attached to the answer of said plaintiff in error; denied that on or about January 17, 1920, or at any other time, plaintiff advised the defendant that it was ready, willing, and able to deliver said evaporated apples in accordance with the terms and conditions of the contract entered into by and between the said parties, a copy of which was attached to the answer of said defendant; defendant further denied upon information and belief that the value of the quantity or quality of evaporated apples to plaintiff at Wenatchee in the State of Washington on or about January 17, 1920, or within any reasonable time thereafter, was the sum of twenty-four hundred dollars, or any sum less than the sum of eleven thousand four hundred dollars, and alleged that the value of said evaporated apples to the plaintiff at the point of shipment, provided in said contract on or about January 17, 1920, and for a reasonable time thereafter, was not less than the sum of eleven thousand four hundred dollars.

By way of special defense, defendant alleged that on or about the 13th day of June, 1919, the parties entered into a contract in writing, copy of which was attached to the answer of said defendant; that said contract was the only contract entered into by the parties, whereby defendant purchased from plaintiff any evaporated apples; that on or about the 23rd day of January, 1920, said contract was rescinded and cancelled by the mutual agreement of plaintiff and defendant; that thereupon all obligations on the part of both parties thereto were extinguished.

Upon the trial of the issues involved in the Court below, judgment was rendered in favor of the plaintiff and against the defendant in the sum of $5522.86.

The following errors are specifically asserted and urged by the defendant:

1.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff to show the market condition of dehydrated apples in the northwest and throughout the country on the 13th day of February, 1923, in the following instances:

> Q. (By Mr. Haven). What was the condition of the market in the northwest and throughout the country at the time of the date of this letter, February 13, 1920, and also on January 24, 1920, if there was any difference.

Mr. Dreher. If the Court please, I object to the question as immaterial, irrelevant and incompetent, and if there is any breach of a contract here the market price as of the date of the breach, the date of delivery, should cover, and not some time subsequent, which is February 13th.

Mr. Haven. January 24th was the date of the first refusal.

The Court. It would be the price at or about that time. Of course the real price upon which the damage would be based would be the price that he received, assuming, of course, due diligence and good judgment in the sale. It would not be the exact price on the day of the breach. It depends, of course, upon what you call the day of the breach. He may answer the question; in so far as it is not material or competent, the Court will give it no consideration in making up its decision. For the record, the objection will be overruled and an exception may be noted.

A. There was no such thing as a market at that time, in the generally accepted use of that term in the trade. The market was dead.

4.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the sale of some cars of dehydrated apples other than the specific car of apples contracted for by the plaintiff and the defendant and the subject matter of the suit between plaintiff and defendant, in the following instance:

Q. (By Mr. Haven). You stated, Doctor, you were endeavoring to sell some cars of apples

belonging to your company, as well as these covered by this contract; when, if at all, did you sell these other cars?

A. The bulk of them were sold almost a year later.

Q. During the intervening time, what, if any, effort did you make to sell those apples?

Mr. Dreher. That is objected to as immaterial, irrelevant and incompetent, and having no bearing on the issues in this case, and particularly having no bearing on the measure of damages.

The Court. What is the purpose of it?

Mr. Haven. The purpose of it is to show good faith in making a sale of the other apples first, and that we made a continuous attempt to sell these apples.

The Court. The objection is overruled.

Mr. Dreher. Exception.

A. We made constant and vigorous efforts to sell them.

6.

The District Court erred in holding and deciding that the measure of damages to be awarded to the plaintiff was the difference between the contract price of the dehydrated apples and the price realized upon the resale thereof and in awarding a judgment based upon such difference.

9.

The District Court erred in weighing and considering evidence and making a finding of fact that "on July 30, 1920, plaintiff sold said evaporated apples which were described in said contract, at a price of eleven and three fourths (11¾) cents per

pound, or a total sum of seventy hundred fifty ($7050.00) dollars. Said sale was made within a reasonable time after the refusal of defendant to accept the delivery of said apples, and with due diligence and in good faith, and as soon as reasonably practicable, by a diligent, competent and prudent salesman, inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff.

11.

The District Court erred in weighing and considering evidence and making a finding of fact that

> "The aforesaid contract of June 13, 1919, was never rescinded or cancelled by the defendant, and the plaintiff never accepted or consented to such rescission or cancellation, and the obligations on the part of the defendant therein contained never were extinguished."

13.

The District Court erred in not holding and deciding and making a finding of fact that the contract sued upon was breached by the defendant on January 23, 1920, and that on said last mentioned date the said breach was accepted and acted upon by the plaintiff.

14.

The District Court erred in not holding and deciding and making a finding of fact that the market price for dehydrated apples of the kind and quality contracted for on January 23, 1923, and for a rea-

sonable time thereafter f. o. b. Pacific Coast Rail Shipping point was between seventeen cents and nineteen cents a pound.

15.

The District Court erred in not holding and deciding and making a finding of fact that there was an active buying market for dehydrated apples of the type, quality and quantity contracted for, during the months of January, February and March, 1920, and that during the said last above-mentioned months the market price for said apples at Pacific Coast Rail Shipping point was as follows:

During January, 1920, seventeen to nineteen cents per pound;

During February, 1920, sixteen to eighteen cents per pound.

During March, 1920, fourteen cents per pound.

16.

That the judgment of the District Court is not warranted nor supported by the fact, or the law in the premises, but is contrary thereto.

Issue.

This appeal presents for adjudication the following points:

1. Was the contract cancelled by the mutual consent and agreement of the parties thereto?

2. If the contract was not cancelled, was there a breach thereof committed by the defendant on January 23, 1920, which breach was accepted and acted upon by the plaintiff on or about January 24, 1920.

3. What is the proper measure of damages, if any, to be awarded to the plaintiff?

4. Did the plaintiff offer to deliver or sell for the account of the defendant the grade and quality of evaporated apples contracted for by defendant.

Points and Authorities.

THE CONTRACT SUED UPON WAS CANCELLED BY THE MUTUAL CONSENT OF THE PARTIES THERETO ON OR ABOUT THE 24TH DAY OF JANUARY, 1920, AND ALL RIGHTS AND OBLIGATIONS OF THE CONTRACTING PARTIES WERE EXTINGUISHED.

After the parties to the contract had entered into the same in the month of June, 1919, the defendant wired the plaintiff on January 23, 1920, as follows:

> "Referring your letter 20th and wire 23rd, you are tendering us choice Wenatchee stock, whereas you sold us car choice Yakima from your Yakima evaporator stop therefore cannot accept." (Trans. p. 37, Plaintiff's Exhibit No. 7.)

In reply thereto, plaintiff on January 24, 1920, wired as follows:

> "We understand your wire 23rd cancels order for car apples is this correct Wire" (Trans. p. 55 Defendant's Exhibit "A".)

Defendant replied on the same day as follows:

> "Replying your wire even date your understanding correct as tender made by you cancels contract dated June thirteenth nineteen nineteen" (Trans. p. 55. Defendant's Exhibit "B".)

We contend that the contract sued upon in this action was cancelled by the agreement of the parties. It must be borne in mind that on the 23rd and 24th days of January, 1920, the market for dehydrated apples was strong, even though the month of January in any year is not the best of month for the evaporated apple trade. The defendant relied upon the cancellation and took no steps to protect itself.

In *Schwab Safe & Lock Co. v. Snow* (Utah), 152 Pac. 171, the defendant placed an order with the plaintiff for a safe, which order was accepted. Subsequently the buyer wrote to the seller

> "We feel very much grieved in having to request you to cancel the order of W. H. Bishop for a No. 160 which you have since Nov. 1906."

To this the seller replied:

> "We are also grieved that it is necessary to cancel the Bishop No. 160 safe, but it was impossible for us to fill the order any sooner."

This was held to amount to a cancellation.

In

Mowry v. Kirk, 19 Ohio St. 375,

the defendant negotiated with plaintiff to sell the latter railroad bonds for $44,000.00, the bonds to be

delivered the next day. On the day appointed the plaintiff called for the bonds, but the defendant refused to let him have the same with the exception of $1000.00 worth. The plaintiff made no tender of the purchase price until a week had passed, when he then called and offered payment. The Court held that the delinquency of the plaintiff in failing to make tender until one week after the proposed date of sale, gave rise to the conclusive presumption that he assented to the rescission and authorized defendant to act on that presumption.

In

> *Sidney Glass Works v. Barnes,* 86 Hun. 374; 33 N. Y. Supp. 508,

the defendant, after ordering stock from the plaintiff became dissatisfied with the tardiness of the shipments and wrote to plaintiff countermanding the order, but instructing plaintiff to ship what stock was on hand. This, the plaintiff did and it was held that the contract was rescinded and cancelled by mutual consent.

> "If either party without right claims to rescind, the contract, the other party need not object, and if he permit it to be rescinded, it will be done by mutual consent; nor need this purpose of rescinding be expressly declared by the one party in order to give the other the right of consenting and so rescinding. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind."

2 *Parsons on Contracts*, 7th Edition 812.

Where a party, even without right, claims to rescind a contract, if the other party agrees to the rescission, or does not object thereto, and permits it to be rescinded, the rescission is by mutual consent.

Ralya v. Atkins, 157 Ind. 331; 61 N. E. 726.

"Cancellation is a matter and a question of intention."

Turner v. Markham, 155 Cal. 573.

"Rescission by mutual consent is possible even where there is a dispute."

Skillman Hdwe. Co. v. Davis, 53 N. J. L. 144; 20 A. T. L. 1080.

See also

Denio v. Hersh, 158 Wis. 502; 149 N. W. 145;
Simpson v. Emmons, 99 A. T. L. 658;
N. Y. Brokerage Co. v. Wharton, 143 Iowa 61; 119 N. W. 969;
Williston on Contracts, Sec. 1467, p. 2615.

"It is competent for parties to mutually annul or rescind a contract and the rescission can be inferred from the acts of the parties."

24 R. C. L. 272.

See also

Florence Minn. Co. v. Brown, 124 U. S. 385;
31 *U. S. Law Edition* 424;
Green v. Wells, 2 Cal. 584;
Murray v. Harway, 56 N. Y. 337.

"The term cancellation of a contract necessarily implies a waiver of all rights thereunder by the parties."

6 R. C. L. 943.

"Where a contract has been rescinded by mutual consent, the parties are, as a general rule, restored to their original rights with relation to the subject matter and no action for breach can be maintained thereafter."

13 C. J. 602;

Hoyt v. Bental, 126 Pac. 370.

"The doctrine of these authorities is that the refusal of one party to perform his contract amounts on his part to an abandonment of it. The other party thereupon has a choice of remedies. He may stand upon his contract, refusing assent to his adversary to rescind it and sue for a breach, or, in a proper case, for specific performance; or he may assent to its abandonment and so effect a dissolution of the contract by the mutual and concurring assent of both parties. In that event he is simply restored to his original position and can neither sue for a breach nor compel a specific performance, because the contract itself has been dissolved."

Graves v. White, 87 N. Y. 463, 465.

See also

Lawrence v. Taylor, 5 Hill (N. Y.) 107;

Hayes v. Stortz, 131 Mich. 63; 90 N. W. 678;

Drew v. Claggett, 39 N. H. 431.

THE PLAINTIFF USED THE WORD "CANCEL" IN ITS TECHNICAL SENSE AND IS BOUND BY THE USE THEREOF.

In business transactions words taken both in their ordinary significance and according to custom and usage have a particular and well defined meaning. Whenever parties are desirous of ending for all

purposes the contract entered into they make use of the word "cancel" in order to signify that they each desire that the contract be ended without the reservation in either party of any rights which would legally accrue to them or either of them by reason of their entrance into the contract. The word "cancel" is entirely different from the word "rescission" as used in ordinary parlance and has a particular and significant meaning attached to it. It has also a technical one well understood in business and in legal circles. Such meaning is particularly patent and obvious to those engaged in the import and export business, to those engaged in handling perishable commodities and requires no explanation. Where it is desired to completely dissolve and destroy a contract the word "cancel" or "cancellation" is always used.

In the case at bar the plaintiff made use of that word for a definite purpose. It was desired that the contract entered into by the parties be annulled, cancelled and destroyed and it was the intention of the parties in so using the word to effect a total dissolution of their covenants and agreements. To give effect to such intention becomes the duty of the Court. It is to be remembered that at the time the correspondence passed between the plaintiff and defendant on or about January 23, 1920, as the same bears reference to the cancellation of the contract, the market for dehydrated apples was regular and sales were had at that time and for a considerable length of time thereafter at usual high prices. We

have in mind the fact that ofttimes contracts are rescinded by a breach thereof or by the agreement of the parties—rescission that leaves, however in the non-defaulting party the right to sue for any damages suffered as a result of such breach. In such case it is clearly the law that the non-defaulting party has his choice of remedies, on any of which he may elect to proceed and in such cases and under such circumstances a technical rescission of the contract is allowed for the purpose of enabling the non-defaulting party to proceed to indemnify himself for any damages suffered by reason of the breach or agreed rescission. He, however, proceeds *on his contract* and whilst the contract is rescinded for all purposes it is not dissolved or annulled or cancelled to that extent that no suit may be brought thereon for a breach thereof.

In the case at bar, however, no such law confronts this Honorable Court. Here there is no question of rescission, only the question of cancellation. We contend that the parties to this contract effected a cancellation—a total dissolution of the contract. This is based both upon their use of technical words and the fact that dehydrated apples were enjoying a strong, ready and active selling market. Their intention to dissolve and annul the contract is manifest from their actions and the correspondence passing between them. That it may not be inferred that a cancellation of this contract was desirable only to the defendant because of a falling market it need only be shown that sales of the commodity

ordered were regular in the months immediately preceding and following the 23rd day of January, 1920. Supportive of this we deem it advisable to quote from the testimony offered on behalf of the defendant, testimony offered by disinterested witnesses:

> "Mr. Oppenheimer. On January 8, 1920, we sold twelve hundred boxes of evaporated apples at eighteen cents a pound. On February 17, 1920, seventy six thousand pounds were sold at 15½¢ per pound. (Trans. p. 62.)
>
> Mr. Dreher. I offer in evidence, if the Court please, the issue of the California Fruit News, as of January 31, 1920, showing the quotations on evaporated apples: Choice in 50 pounds at 17½ cents; extra choice, 50 pound boxes, 18¼; fancy, 50 pound boxes, 20 cents. (Trans. pp. 63-64.)
>
> Mr. Dreher. .We offer in evidence the issue of the paper (February 7, 1920) showing choice apples in 50 pound boxes, 17¼ cents; extra choice, 50 pounds, 18 cents; fancy, 20 cents; f. o. b. California shipping points. (Trans. p. 64.)
>
> Mr. Dreher. The next issue is the 14th of February; the price for choice, 50 pound boxes, 17; extra choice 17½; fancy 20. For February, 1921, the price of choice is 16 to 16½; extra choice 16½ to 17; fancy, 18½ to 19." (Trans. p. 65.)

There is further the testimony of Mr. Arthur C. Oppenheimer who testified that he had been engaged in handling dried fruits for twenty-six years and was familiar with the market conditions prevailing during the years 1920 and 1921. (Trans. pp. 61-62.)

It can therefore hardly be contended with any degree of conviction that the defendant desired to escape from the contract because of a falling market. To the contrary we reiterate that the market was regular and strong, that sales were being made and that the cancelling of the contract was first broached by the plaintiff.

On February 2, 1920, the defendant wrote to the plaintiff calling attention to the agreed cancellation showing that the intention to cancel was in the minds of the parties, (Trans. pp. 56-57. Defendant's Exhibit "C") and it is to be here observed that it was not until February 13, 1920, that the plaintiff attempted to escape from the agreed cancellation—eleven days after its receipt of the confirmation of cancellation. (Trans. 41. Plaintiffs' Exhibit 11.) From the 24th day of January, 1920, to the receipt of the last mentioned letter the defendant had relied on the agreed cancellation and necessarily took no steps to protect itself. What actuated the plaintiff in writing the letter of February 13, 1920, is not shown but it can be justly and correctly surmised that one of the motives underlying the dictation of the said letter was the information received from an unknown source by the plaintiff that the U. S. Government was bringing back to the United States from Europe evaporated apples and fruits and throwing them on the market in large quantities, "for anything that was offered for them". (Trans. p. 43.) Aside from the indictment of the U. S. Government for the poor business methods indulged

in by it, in so offering for sale "evaporated apples" and "fruits" upon the unsupported testimony of the manager of the plaintiff there is to be found in such testimony the reason for the letter of the plaintiff dated February 13, 1920, when for the first time the agreed cancellation of the contract was denied. Regardless of what intendment the author of the telegram of January 24, 1920, placed upon his words contained therein the fact is that he led the defendant to place reliance upon the cancellation—to consider the contract annulled and dissolved, and he may not at this late date be heard to say that a cancellation was never consummated or intended.

No rule is better settled than that technical words are presumed to have been used technically unless the contrary appears on the face of the instrument.

> *King v. Johnson,* 117 Va. 52; 83 S. E. 1070;
> *Hickel v. Starcher,* 90 W. Va. 369; 110 S. E. 695;
> *Robertson v. Wampler,* 104 Va. 380; 51 S. E. 835.

In the construction of contracts it is a general rule that technical words are to be taken according to their approved and known use in the trade in which the contract is entered into or to which it relates.

> 3, *Starkie Evidence,* 1036.

Words are not to be interpreted by any theory of how they ought to be used but in accordance with

the actual use to which they are put by those for whom custom establishes a standard.

Continental Casualty v. Johnson, 74 Kans. 129; 85 Pac. 545.

Words must be understood in the sense in which they are commonly used in the business to which the contract in which they are found relates.

Graybull v. Penn Twp. Mut. F. Ins. Ass'n., 170 Pac. 75.

See also

Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198.

Technical words will be taken in a technical sense.

13 C. J. 532. Note 490.

CANCEL MEANS TO ANNUL AND DISSOLVE.

"One meaning of cancel is to annul. Taking it to have that meaning here there is nothing in the expression of the arbitrators inconsistent with this supposition, that they meant the equitable set offs to be the means or causes by which the mortgage and note were to be null and void, cancelled, annulled. And if they meant this they did not go beyond the submission."

Golden v. Fowler, 26 Ga. 451-464.

Webster defines cancel as follows:

"To annul or destroy" and gives the following synonyms: "Blot out, obliterate, efface, expunge, annul, abolish".

The same definition is given of cancel in the Standard dictionary.

For a definition of the word "cancel" or "cancellation," see the following cases:

Babbit v. Fidelity Trust Co., 72 N. J. Eq., 745.

Brown v. Gibson's Ex., 107 Va. 383; 59 S. E. 384;

City of St. Louis v. Kellman, 139 S. W. 443; 235 Mo. 687;

Wilson v. People, 36 Colo. 418; 85 Pac. 187;

Whedon v. Lancaster County, 80 Neb. 682; 114 N. W. 1102.

After a contract is discharged by recission or substitution of a new contract no action can be maintained on the original contract.

Lipschultz v. Weatherly & Twiddy, 140 N. C. 365; 53 S. E. 132.

Citing

Dreifus v. Columbian Exposition Co., 194 Pa. 475; 75 A. S. R. 704.

In *People v. Hollett,* 1 Colo. 352, the Court, at page 359 quotes with approval the following language from *People v. Hughes,* et al., 3 Mich. 598:

> "The natural import of words is that which their utterance promptly and uniformly suggests to the mind, that which common use has affixed to them; the technical is that which is suggested by their use in reference to a science or profession, that which popular use has fixed to them and when the natural and technical import unite upon a word both their rules

> combine to control its construction, and, indeed it is difficult to understand how any other signification than that which they suggest can be affixed to it unless upon the most positive declaration that a different one was designed."

Taking therefore into consideration the stability of the market for the commodity originally contracted for by the parties to this litigation and taking into consideration the intention of the parties to cancel the contract as manifested by their use of the very language from which a cancellation and abolishment only can be imported, we submit that the contract was cancelled, abolished and destroyed without the reservation of rights in any of the parties thereto and that the cancellation leaves them in the position as if no contract had ever been entered into. If the plaintiff did not desire a cancellation there are numerous words which it could have used in order that an intention of cancellation be not manifested on its part. To the same extent it is true that the defendant likewise if it did not desire a cancellation could have used some other word but taking the action of both parties, their intention and the use of the word "cancel" we are convinced that a cancellation of the contract was effected.

Measure of Damages.

WHAT IS THE PROPER MEASURE OF DAMAGES, IF ANY, TO BE AWARDED TO THE PLAINTIFF?

In addition to our contention set forth hereinabove that the contract sued upon in this case was cancelled by the mutual agreement of the parties, and which contention we maintain, if allowed, is the correct solution of the problem that confronts this Honorable Court, we maintain further that the Court below erred in allowing the measure of damages prayed for, to-wit, the difference between the contract price of the commodity ordered and the price realized upon the resale had without notice to the defendant, five months after the time agreed upon in the contract for delivery. If we forego for the purpose of discussing this contention our claim that the contract was cancelled we maintain that the true measure of damages, if any, to be awarded to the plaintiff was either of one of two measures.

(1) If the contract sued upon was not cancelled by the mutual agreement of the parties thereto, then it was breached by the defendant on the 23rd day of January, 1920, which breach was accepted and acted upon by the plaintiff on January 24, 1920, and the only measure of damages to be awarded to the plaintiff was that based upon the difference between the contract price and the market price on the date of the acceptance of the breach; or

(2) If no cancellation took place—and if the breach was not accepted on January 24, 1920, then an anticipatory breach of the contract took place on January 23, 1920, which was not accepted nor acted upon by the plaintiff, the contract was kept alive for the benefit of both parties until the 31st day of January, 1920, the date agreed upon for delivery, and the measure of damages to be awarded to the plaintiff is the difference between the contract price and the market price at the date and place of delivery agreed upon or within a reasonable time thereafter.

It is the well settled law in the United States and particularly the law of the States of California and Washington that upon an anticipatory breach of an executory contract of sale the nondefaulting party can treat the breach as a termination of the contract, at which time his cause of action will arise and fix his measure of damages. On the other hand he may refuse to acquiesce in the attempted termination of the contract arising out of the anticipatory breach, and keep the contract alive for the benefit of both parties until the date of performance; in this case January 31, 1920. Either the anticipatory breach is accepted and acted upon by the non-defaulting party or it is not. If it is, the measure of damages is fixed as of the date of the breach and acceptance thereof. If it is not and the contract is kept alive until the date of performance arrives, then the measure of damages is the difference between the contract and

the market price at the time and place of delivery or within a reasonable time thereafter but the non-defaulting party *must* elect whether he will treat the contract as ended or as still existing and from his actions the election may be derived. The doctrine is well settled in England and is adopted by the great majority of the American Courts and text books.

In the case of *Roehm v. Horst*, 179 U. S. 1, it was held that the seller may accept the repudiation of the sale on the date on which it was made and act on the repudiation and breach but he does not have to. This decision was quoted with approval in the case of *Marx v. Van Eighan*, 85 Fed. 853, wherein it was said:

> "In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated his right of action accrues at once. The latter, however, must elect whether he will treat the contract as terminated or as still existing."

The doctrine of these authorities is adopted and approved without exception as far as we have been able to ascertain by the federal decisions and by

the great number of decisions by the state Courts where the question has been raised.

Brewing Co. v. Bullock, 8 C. C. A. 14; 58 Fed. 83;
Howard v. Daly, 61 N. Y. 362;
Feris v. Spooner, 102 N. Y. 10; 5 N. E. 773;
Windmuller v. Pope, 107 N. Y. 675; 14 N. E. 436;
Nickols v. Steel Co., 137 N. Y. 471; 33 N. E. 561;
Fox v. Kitton, 19 Ill. 519;
Engesette v. McGilvary, 63 Ill. App. 461;
Railway Co. v. Richards, 152 Ill. 59; 38 N. E. 773;
Crabtree v. Messersmith, 19 Iowa 179;
Holloway v. Griffith, 32 Iowa 409;
McCormick v. Basal, 46 Iowa 235;
Platt v. Brand, 26 Mich. 173;
Sloss Co. v. Smith, 11 Ohio 312;
Kalkgoff v. Nelson, 60 Minn. 284-287, 62 N. W. 332;
Davis v. Furniture Co., 41 W. Va. 717; 24 S. W. 630.

We contend that the plaintiff by its actions as manifested in its correspondence with the defendant elected to accept the anticipatory breach of the contract as of the 24th day of January, 1920, at which time, under the foregoing decisions, his cause of action arose and was perfected. On such date, to-wit, the 24th day of January, 1920, the market

price for dehydrated apples of the quality and kind contracted for f. o. b. Pacific Coast rail shipping point was between 17-½¢ and 20¢ per pound. (Trans. pp. 62, 63 and 64.)

The contract price of the commodity sold was $11,400 and taking the mean market price between 17½¢ and 20¢ or 18¾¢, the correct market price of the rejected dehydrated apples on January 24, 1920, and for a reasonable time thereafter, was the sum of $11,250.00. The correct measure of damage therefore based upon the difference between the contract price and the market price on the date of the acceptance of the breach and for a reasonable time thereafter was the sum of $150.00.

As we have heretofore stated if we forego the theory of cancellation it must be admitted that there was an anticipatory breach of the contract which breach was accepted by the plaintiff on the 24th day of January, 1920. The damages are necessarily fixed as of that date and for a reasonable time thereafter based as they are upon the then prevailing market price for dehydrated apples. The only evidence offered as to the market price prevailing on January 24, 1920, and for a reasonable time thereafter was offered by the witnesses for the defendant, except the general announcement by the manager of the plaintiff that "there was no such thing as a market at that time in the generally accepted use of that term in the trade. The market was dead." (Trans. p. 43.) We do not wish to be understood as con-

tending that it is imperative that the non-defaulting party accept the breach as of the date thereof, because such is not the law. We do contend, however, that it is the privilege of the non-defaulting party to elect to accept the breach as of the date thereof. In fact under the ruling in *Marx v. Van Eighen,* (supra), the privilege of election, as to whether the breach will be accepted as of the date thereof or whether the contract will be kept alive until the date of performance rests solely with the non-defaulting buyer—*but the election must be made.* We submit that under the law of the correspondence and the facts of this case the election to rescind and to accept the breach as of the date thereof was made by the plaintiff on the 24th day of January, 1920, and the measure of damages is fixed as of that date or within a reasonable time thereafter.

As was well said in the case of

Masterton v. Mayor of Brooklyn, 7 Hill 61; 42 A. D. 38,

"Where the contract is broken before arrival of the time for full performance and the opposite party elects to consider it in that light the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and ascertained in cases like the present as in actions predicated upon a failure to perform at the day.

Turning to the third contention raised by the defendant, to-wit, that the correct measure of damages disallowing a cancellation or a measure of damages based upon the difference between the contract price and the market price at the date of the breach and acceptance thereof, the true and the only measure of damage to be awarded the plaintiff under the facts and circumstances of this case is one based upon the difference between the contract price and the market price at the date and place of delivery, or within a reasonable time thereafter.

The contract herein was entered into at the City and County of San Francisco, State of California, and was to be performed in the State of Washington. Suit was filed for the breach of the contract in the State of California. The remedy therefor, if any, must be based upon the law of the forum—the law of the State of California.

In *Scudder v. Union National Bank,* 91 U. S. 406, the Supreme Court of the United States says:

> "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought."

In *U. S. Bank v. Donnelly,* 8 Pet. 361, 8 Law Ed. 974, an action was brought in Virginia on notes

executed and made payable in Kentucky. It was held that the plea of the statute of limitations of Virginia was a bar to the action.

The law of the forum governs the remedies.

9 Cyc. 684, and cases cited.

Upon the anticipatory breach of an executory contract of sale where the breach is not accepted on the date thereof but the contract is kept alive for the benefit of both parties, the measure of damages is the difference between the contract price and the market price of the rejected commodity at the time and place of delivery or within a reasonable time thereafter. This law governing the measure of damages is particularly true of the law of the State of California, the law of the forum that must govern the remedy, if any, possessed by the plaintiff.

> "The general rule is that the measure of damages for the breach of a contract for the sale of a commodity where the vendee refuses to accept delivery, is the difference between the contract price and the market value at the time and place of delivery."

Hughes v. Eastern Ry. & Lumber Co., 93 Wash. 558; 161 Pac. 343, citing numerous cases.

See also,

Carver-Shadbolt Co. v. Klein, 69 Wash. 586, 125 Pac. 944;

35 Cyc. 592, and citations.

Where there is an exact time fixed for delivery the damages where buyer refuses to accept delivery

and repudiates the contract is the difference between the contract price and the market price at the date of demand and refusal.

Jones-Scott Co. v. Ellensburg Milling Co., 116 Wash. 266; 199 Pac. 238.

It is no doubt the approved law of the land, that where one party to an executory contract repudiates it or announces his unequivocal intention to not perform, the party not in default can ignore and refuse to accept the breach or abandonment and keep the contract alive until the date of performance in which case his damages will be the difference between the contract price and the market price at the date and place of performance,

As was well said in

Dill v. Memford, et al. (Ind.), 49 N. E. 861,

"If it is found that the contract is executory and no title has passed, the seller would have his action for damages, and the measure of damages would be the difference between the contract price and the market price at the time and place when and where under the contract he should have accepted."

"For the refusal to accept the goods purchased by an executory contract the measure of damages is the difference between the contract price and the market price at the time and place of delivery. If there is no market for articles of the character sold at that time at the place for delivery then the measure of damages is the difference between the contract

price and the market value in the nearest available market less the cost of transportation."

Lawrence Canning Co. v. H. D. Lee Mercantile Co., 5 Kan. App. 77; 48 Pac. 749.

See also,

Gibbs v. Dare, 103 Cal. 454;
Mechem's Cases on Damages, 265;
U. S. v. Smoots, 21 Law Ed. 107;
Phillpotts v. Evans, 5 Mess. & W. 475.

THE MEASURE OF DAMAGES TO BE AWARDED TO THE PLAINTIFF, IF ANY, IS BASED UPON THE LAW OF CALIFORNIA, WHICH IS LIKEWISE THE GENERAL LAW OF THE MAJORITY OF THE STATES.

The resale had by the plaintiff does not under the facts of this case warrant an award of damages based upon the difference between the contract price and the price realized upon the resale.

We contend that the Court below committed error in granting a judgment based upon the difference between the contract price and the price realized upon the resale. Our contention is based upon the fact that the plaintiff in this action, under the law of the State of California which governs the remedy of the plaintiff and also under the law of the State of Washington, the place where the contract was to be performed, did not effect a resale in the manner required by law in order that it might be granted as damages the difference between the contract price and the price realized upon the resale.

If the plaintiff did not so hold the resale, then it is relegated to a measure of damages based upon the difference between the contract price and the market price at the time and place of delivery or within a reasonable time thereafter.

In the first place the resale was not made within a reasonable time after the date of performance.

> "The seller is not bound to sell at the contract place of delivery or immediately but it is generally his duty to resell within a reasonable time and if he does not the original buyer is not responsible for the delay."
>
> 35 Cyc. 524.

We submit that a period of five months is not a reasonable time for a resale under the facts and circumstances of this case, particularly in view of the testimony of the disinterested witnesses to the effect that sales were made of similar dehydrated apples in January, February and March, of 1920, and for prices far in excess of those received by the plaintiff upon the resale in a market distant from that provided in the contract.

In order to bind the defendant by the amount realized upon the resale it was necessary:

(1.) That notice of the resale be given to the defendant;

(2.) That the resale be made within a reasonable time, and

(3.) That the resale be made in the market of delivery and performance, or in the nearest available market.

In *Bagley v. Findley,* 82 Ill. App. 524, the Court held that to recover the difference between the contract price and the resale price notice of the sale must be given. If it is not given, the usual measure of damages will apply, to-wit, the difference between the contract price and the market price at the date and place of delivery.

In *Davis Sulphur Ore Co. v. Atlanta Guano Co.,* (Georgia), 34 S. E. 1011, the vendee became insolvent before the arrival of the goods sold under an executory contract of sale. Accordingly the seller exercised his right of stoppage in transitu and resold the goods without notice to the vendee. The Court, after setting forth the rights of the vendor, including the right to resell after notice to the defaulting buyer, says:

> "Unless the vendee has notice of the intention to resell he is not bound by the amount realized and this is right upon both principle and justice. The vendor acts as the agent of the vendee in making the sale and sells at the vendee's risk; and it would be unjust to hold the vendee bound, except where he has notice of the intention of the vendor to resell. If the vendee has notice, he may attend the sale, if a public one, and see that it is fair or whether the sale be public or private he may be able to bring about competition or to secure a purchaser who will give the full value of the goods. He may be able, in other words, to prevent loss to himself."

See also,

Anderson Carriage Co. v. Gillmore, 123 Mo. App. 19; 99 S. W. 766;

Habenicht v. Lissak, 77 Cal. 139;
Morrell v. San Tomas Drying & Packing Co., 13 Cal. App. 305;
Frisbie v. Rosenberg Bros. & Co., 11 Cal. App. 639;
Bridges Grocery Co. v. Dan Grocery Co., 9 Ga. App. 189; 70 S. E. 964.

In *Dill v. Memford, et al.,* (Ind.) 49 N. E. 861, the Court speaking with reference to the right of the plaintiff to maintain an action for damages based upon the difference between the contract price and the resale price, says:

> "To acquire the right to maintain such an action it was incumbent upon them to give the buyer notice of the resale."

To the same effect see
Pillsbury Flour Co. v. Walsh, 110 N. E. 96.

In *Southern States Co. v. Long,* 73 So. 148, on the question as to whether or not the rejecting party is entitled to notice of the resale, the Court, after citing cases to the effect that such a question has been decided in both ways in Alabama, says:

> "The first case cited holds that notice is not essential to the seller's right to hold the purchaser for the difference between the contract price and the amount realized at the resale, but the other cases which are more recent hold that the purchaser is entitled to notice but as the failure to give notice only affects the measure of the plaintiff's recovery, it is a fact that may be offered under the general issue."

See also

Sims-McKenzie Grain Co. v. Patterson (Ga.), 73 S. E. 1080;

Bennett v. Mann (Ga.), 101 S. E. 706.

"Where the possession or control of goods is with the seller and the buyer refuses to accept them without legal justifiable cause, the seller after notice to the buyer, may, without breaching the contract on his part, resell the goods as the agent of the buyer, observing good faith and due care to conserve the purpose of that action."

Johnson v. Carden, 65 So. 813.

In *Faulk v. Richardson* (Fla.), 57 So. 666, the defendant refused to take and pay for an automobile purchased by him from plaintiff. Plaintiff thereupon and without notice to defendant resold the car. Upon action brought, the plaintiff was granted damages based on the difference between the contract price and the resale price. Upon appeal this judgment was reversed, and the Court says:

"The declaration does not measure the damages by the difference between the contract price and the market price but is measured by the difference between the contract price and the resale price in Pensacola. * * * Richardson upon his own showing owed some duty to Faulk to keep him advised of the status and cannot be permitted to pile up the damages against one whom he has kept in the dark."

See

Benjamin on Sales, p. 807.

"If the vendor sells at some other place than that agreed upon for the delivery of the prop-

> erty he must show that the price realized was equal to or greater than the price which could have been realized had the sale been made at the place of delivery."

Willson v. Gregory, 2 Cal. App. 312;
Ingram v. Mathier, 3 Mo. 209.

In *Logan v. Carroll,* 72 Mo. App. 613, it was held that

> "the vendor can recover the difference between the contract price and the price realized on the resale only when the resale is made after notice to the defaulting buyer."

See also

Ricker v. Tenbroeck, 63 Mo. 563;
Anderson v. Frank, 45 Mo. App. 482.

UNDER THE LAW OF CALIFORNIA AND ALSO WASHINGTON IN ORDER TO HAVE THE PRICE REALIZED ON THE RESALE AS EVIDENCE OF THE MARKET VALUE OF THE COMMODITY RESOLD, IT IS NECESSARY THAT THE RESALE BE HAD IN THE SAME MANNER AS THAT OF A VENDOR FORECLOSING HIS LIEN.

In the case at bar there is no evidence of the market value of dehydrated apples as of the date of delivery or of the market value thereof within a reasonable time after the date of delivery, save and except the evidence offered by witnesses for the defendant.

In order that the plaintiff in this action be granted as a measure of damage the difference be-

tween the contract price and the price realized upon the resale it must prove that it pursued in the resale the same course as that required of a vendor who sells to enforce his lien. In other words, the sale must be had in good faith, within a reasonable time after the date of delivery, after notice in the customary manner, and it must also be shown that the resale took place at the place of delivery or if there is no market there then in the nearest and most available market.

Mechem on Sales, Vol. 2, p. 1650.

If the resale is not had in the manner as set forth in the above authority, and in accordance with section 3049 of the Civil Code of the State of California, then the price realized upon the resale is not evidence of the market value of the commodity at the time and place of delivery called for in the contract or within a reasonable time thereafter, and the plaintiff must show that the price realized upon the resale was the highest market price at the time and place of delivery or within a reasonable time thereafter.

As we have heretofore said we submit that the resale taking place as it did at a period five months after the date fixed for delivery, in a market far distant from the place of delivery and not having taken place in the manner required of a vendor in foreclosing his lien is not evidence of the market value of the goods at the time and place of delivery or within a reasonable time thereafter. This being

so the only evidence of the market value of the commodity rejected at the time and place of delivery and within a reasonable time thereafter is that offered by the defendant and if any measure of damages is awarded to the plaintiff it must be based upon the evidence of the market value as shown by the witnesses for defendant. (Trans. pp. 62, 63, 64, 65.)

In *Hess v. Seitzick,* 95 Wash. 393; 163 Pac. 941, the respondent brought an action to recover from appellant damages for his failure to accept and pay for certain butter. The butter was purchased to be delivered at Seattle, subject to the inspection of the appellant (buyer). The butter arriving in Seattle in 1914, after inspection by the buyer was rejected. It was then stored in a warehouse. In December, about three months after the rejection, the seller sold the butter at a loss. No notice of the sale was given to the buyer. After judgment for the respondent the buyer appealed on the ground that the damages allowed were improper; that the true measure of damages was the difference between the contract price and the market price at the time and place of delivery. It was held:

> "On the failure of the buyer to comply with the contract of sale, the seller has of course three remedies:
>
> (1) It could store and hold the property subject to the buyer's order, and sue for the contract price;
>
> (2) It could resell the goods after notice to the buyer, and recover the difference between the price received and the contract price;

(3) It could retain the property as its own and recover the difference between the market value of the same at the time and place of delivery and the contract price, if the market price was less than the contract price. But, as it elected to keep the property it is clear that its measure of damages is found in the last of the three remedies mentioned."

The Court says further:

"After inspection it was rejected. The title therefore never passed but remained in the seller. The seller in such cases is not bound to resell in order to ascertain the value; he may either resell or rely upon other evidence of value, at his option. If he does resell he must, in order to have the result available as evidence of value, pursue, in substance, the same course as that required of a vendor who sells to enforce his lien; that is he must sell in good faith within a reasonable time after notice in the customary manner, and at the place of delivery, or, if there be no market there, then in the nearest and most available market." (Citing numerous cases and authorities.)

See also

Gay v. Dare, 103 Cal. 454.

In California the measure of damages awarded to a seller on the buyer's refusal to take and pay for personal property is

(1) If the property has been resold pursuant to section 3049 of the Civil Code the excess of the amount due from the buyer under the contract over the net proceeds of the resale.

Sections 3005, 3049 and 3311 of the Civil Code of the State of California, set forth the manner in

which vendors' liens must be foreclosed after the publication of notice and the other requirements necessary in order that a resale be binding as conclusive evidence of the value of the goods resold. If, however, the property has not been so resold the seller is awarded as damages the excess due from the buyer over the value to the seller including the expenses of carrying it to market. The value is estimated as the price the seller could have obtained in the market nearest to the place where it should have been accepted by the buyer at such time after the breach as would have sufficed for a resale.

Sec. 3353 Civil Code of the State of California.

It is thus plain that under the law of the State of California in executory contracts for the sale of personal property where title has not passed no notice of a resale is required for the reason that since the title has not passed it is not necessary to foreclose a vendor's lien and therefore section 3049 of the Civil Code of the State of California is not applicable. The value of the goods to the seller at such time after the breach as would have sufficed for a resale may be shown by any competent evidence. If, however, the rejected goods are resold pursuant to Section 3049, the amount realized on such a resale had is conclusive and no evidence is required of the market value of the date of the resale, providing it is made within a reasonable time after the date of delivery provided in the contract.

If the provisions of Section 3049 of the Civil Code are not followed a resale held privately may be made but it must be proved that the prices realized on the resale were the highest market prices prevailing on the date of the resale and the date thereof must be shown to be within such reasonable time after the date of delivery as would have sufficed for a resale and it must further be proved that if the goods are sold in a market distant from that provided in the contract that market was the nearest available market.

> *Katzenbach v. Breslauer,* 51 Cal. App. 757; 197 Pac. 967.

It is to be noted here that the same provisions with reference to the foreclosure of liens in California are applicable to the foreclosure of vendor's liens in the State of Washington.

> *Remington's Compiled Statutes of Washington,* Liens Section 1196 (Cd. '81, Sec. 1985; 1 H. C. Sec. 1704).

> "Before the sale of property under execution order of sale or decree, notice thereof shall be given as follows.
>
> In case of personal property by posting written or printed notice of the time and place in three (3) public places in the county where the sale is to take place, for a period of not less than ten days prior to the date of sale." (L. '03, p. 381; section 1; C. f L. '97, p. 265, section 1.)

In the case of

> *David Hewes v. Germain Fruit Co.,* 106 Cal. 441,

the seller brought an action against the buyer for damages based upon the buyer's refusal to accept and pay for certain raisins tendered to him pursuant to a contract of sale. Title did not pass. The seller prayed for damages based on the difference between the contract price and the amount realized on the resale. After judgment for the plaintiff the defendant appealed contending that the plaintiff should have resold the raisins in the manner prescribed by Civil Code of the State of California for the sale of pledged property, and cited Section 3049 of the Civil Code. The Supreme Court after pointing out that the contract of sale was executory and no title had passed, says:

> "The sale of such property in the manner in which pledged property is required to be sold is not confined however to property, the title to which has passed to the buyer; but, if the property is sold in that manner where the title has not passed, such sale is conclusive as to the value of the property while, if it is not so sold, the plaintiff must prove the value of the property to him."

It is to be observed here that if the dehydrated apples in this case had been resold by the plaintiff in the manner required for the foreclosure of a vendor's lien, the amount realized upon the resale would have been conclusive as against the defendant. However, the resale was had in distant markets five months after the date of delivery provided in said contract and it must be admitted that if diligence in attending to the resale was had by the plaintiff the resale could have been made in a short time after

the date of delivery called for in the contract. This is proved by the testimony of witnesses for the defense that sales of similar commodities were had in California and other places both at the time of the date provided in the contract for delivery and for a reasonable time thereafter. (Trans.. pp. 62, 63, 64, 65.)

In *Meyer v. McAllister,* 24 Cal. App. 16, 140 Pac. 42, the action was for a breach of contract arising out of the refusal of the buyer to accept and pay for certain machinery. Within two months after the refusal the seller, without notice to the buyer, sold the rejected machinery at public auction. It was held:

> "(1) The sale was made without actual notice to the defendant. Therefore the amount received at the sale is not conclusive evidence of the value by which to measure the damages for which the defendant is liable;
>
> (2) For the same reason (and also because title had not passed from the vendor) the first subdivision of section 3311 of the Civil Code is not applicable to the case."
>
> "The detriment caused to the vendor by the defendant's breach of his agreement is to be measured by subdivision 2 of said Section 3311, and in the present case consists in the excess, if any, of the amount due from the buyer under the contract over the value to the seller."

See also Section 3353, Civil Code of the State of California;

Madison v. Weil Zuckerman & Co., 48 Cal. App. 308, 192 Pac. 110.

In the case of

Lund v. Lachman, 29 Cal. App. 31, 154 Pac. 295;

the facts were as follows:

Defendant rejected a lot of wine bottles tendered to him by the plaintiff pursuant to a contract of sale. At a series of private sales held from July 6, 1911, to March 20, 1912, the plaintiff resold the bottles at various prices. Tender of delivery was made on June 16, 1911. There was evidence that the market price at the place of delivery as of the time of delivery and for a reasonable time thereafter was substantially higher than the contract price. The plaintiff having sued for the difference between the contract price and the price realized upon the resales which resales were had without notice to the defendant was granted only nominal damages. On the subject of the measure of damages the Court says:

> "The bottles having been sold at private sale, and it being an admitted fact in the case that title to the bottles had not passed from the plaintiffs, it is conceded, as it must be, that plaintiff's only remedy was damages for the breach of the contracts (Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926), and that the measure of the damages alleged to have been thereby sustained is to be found in section 3353 of the Civil Code, which provides that:
> 'In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such

time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.'

"While it was not incumbent upon the plaintiffs to make the resale immediately after the repudiation of the contract by the defendant, nevertheless the plaintiffs were required to exercise reasonable diligence in locating the nearest market, and ascertaining the prevailing market price for the rejected bottles; and there can be no doubt that there was sufficient evidence to justify the trial court in finding that, if the plaintiffs had seen fit to seek and take the market price for the bottles which prevailed on the day and for many days following their arrival and tender and rejection at San Francisco, they could have sold them at a substantial advance over the contract price which would have more than covered the expense of drayage, storage, and insurance for a reasonable time had such expense been found to be necessary, and therefore in no event would the plaintiffs have been entitled to recover such expense from the defendant."

In

Rounsavall v. Herstein Seed Co. (New Mexico), 186 Pac. 1078,

the facts were as follows:

Certain beans were sold by the appellant doing business in Kentucky to the appellee doing business in New Mexico at 15¢ per pound f. o. b. Trinidad, Colorado. Appellee rejected the beans and appellant sold them to a third party. The appellant offered no evidence of the market value at date of breach or at date of delivery and was granted

nominal damages. Upon appeal he contended his damages should have been the difference between the contract price and the resale price.

> "Appellee argues that the measure of damages was the difference between the sale price and the amount which the plaintiff was able to get for the beans after notice to the appellee of his intention to sell and after exercise of reasonable diligence to sell the beans at the best price obtainable. The general rule is well established that the measure of damages in such a case is the difference between the market value of the goods at the time and place of delivery and the contract price." Tufts v. Bennett, 163 Mass, 398, 40 N. E. 172; Mechem on Sales, §1690.

In

> *Hughes v. Eastern Ry. & Lumber Co.* (Wash.), 161 Pac. 343;

the contract sued on was one for the sale and delivery of logs. The defendant rejected the logs. Appellant contended that the measure of damages was the difference between the contract price and the market price at the time of the breach. The Court says:

> "The general rule is that the measure of damages for the breach of a contract for the sale of a commodity, where the vendee refuses to accept delivery, is the difference between the contract price and the market value at the time and place agreed upon for delivery. (Citing cases.)

THE TENDER CLAIMED TO HAVE BEEN MADE BY PLAINTIFF WAS NOT MADE IN ACCORDANCE WITH THE TERMS OF WRITTEN CONTRACT AND THE EVAPORATED APPLES SOLD BY PLAINTIFF WERE NOT OF THE GRADE CONTRACTED FOR BY DEFENDANT.

The written contract entered into by the parties, a copy of which was attached to defendant's answer, provided for the sale of one car, sixty thousand pounds, *choice* evaporated apples at 18½¢. Immediately after the description of the merchandise sold appeared the following:

> "With provision that seller may be privileged to substitute grades *providing cannot fill order with grade ordered* at extra choice 19¢ fancy 19¾¢." (Italics ours.)

It is an elementary proposition of law which does not require any citation of authorities that the parties have a right to contract on such terms as they may desire and, unless the consideration or subject matter of the contract is illegal neither a court of law nor a court of equity has any right to substitute or make new terms for the contracting parties. In the instant case the parties saw fit to contract for the purchase and sale of sixty thousand pounds of *choice* evaporated apples and the defendant was entitled to the delivery of this grade at the stipulated price. They saw fit to insert the additional provision to the effect that if the seller *cannot fill the order with choice evaporated apples* it was privileged to substitute extra choice or fancy at advanced prices. Without adhering to the contract, and without giving any explanation therefor whatsoever, the

plaintiff attempted to tender and claims to have set aside and sold for the account of the defendant sixty thousand pounds of *extra* choice evaporated apples. This was certainly not a compliance with the terms of the contract, and such a sale cannot form the basis of a judgment for damages.

The correspondence will show that the defendant was of the opinion that it was purchasing evaporated apples manufactured at the Yakima plant of the plaintiff and that the plaintiff took the position that it was not obligated to make deliveries from the Yakima plant but was privileged to deliver any choice evaporated apples. The contract is silent as to the place of production and absolutely no showing of any kind was made to the effect that the plaintiff could not fill, either in whole or in part, the contract for sixty thousand pounds of choice evaporated apples. As long as choice evaporated apples were available in the market the defendant had a right to insist upon the delivery of that particular grade. We are not, however, required to go so far in our contentions as Dr. Cardiff testified that the plaintiff had about a half a car to a car of choice evaporated apples at its Yakima plant. (Tr. page 54.) These were available for shipment to the defendant, but the evidence will show that it was not until March 6th, 1920 (more than a month after the expiration of the time provided for the delivery of said apples), that the plaintiff offered to deliver any choice evaporated apples whatsoever in fulfill-

ment of said contract. (Defendant's Exh. D., Tr. pages 57, 58.)

The argument hereinabove made on the proper rule of the measure of damages that should apply in this case was made upon the theory that the plaintiff had sold evaporated apples of the identical grade and quality contracted for. We do not wish, however, to be understood as having waived the further objection that the evaporated apples sold were not of the grade and quality which the defendant was entitled to receive. There is a difference between the grade, quality and price of *choice* and *extra choice* evaporated apples. The defendant contracted for *choice* but in making a sale for the purpose of fixing its damages the plaintiff sold *extra choice* apples. By permitting the introduction of the evidence of such a sale and using it for the purpose of computing the damages awarded to plaintiff the Court erred.

In making a tender of extra choice apples and setting aside evaporated apples of that grade without making a showing on the trial that it could not fill the contract with choice evaporated apples, the plaintiff was guilty of breaching its contract. It being the first to have breached its part of the contract, it cannot maintain any action thereunder for the recovery of damages from the defendant.

> *Minaker v. California Canneries Co.*, 138 Cal. 239;
>
> *Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 252.

In conclusion we submit that the trial Court clearly erred in admitting evidence and in adopting the measure of damage in computing the amount of judgment entered for the plaintiff.

Dated, San Francisco,
October 10, 1923.

Respectfully submitted,
Fred L. Dreher,
Attorney for Plaintiff in Error.